RECORD AND BRIEFS

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No. 16-111

# In the Supreme Court of the United States

MASTERPIECE CAKESHOP, LTD.,
AND JACK C. PHILLIPS,
*Petitioners,*

v.

COLORADO CIVIL RIGHTS COMMISSION,
CHARLIE CRAIG, AND DAVID MULLINS,
*Respondents.*

*On Petition for Writ of Certiorari*
*to the Colorado Court of Appeals*

## BRIEF OF THE COLORADO CIVIL RIGHTS COMMISSION IN OPPOSITION

CYNTHIA H. COFFMAN
Attorney General

FREDERICK R. YARGER
Solicitor General
*Counsel of Record*

GLENN E. ROPER
Deputy Solicitor General

STACY L. WORTHINGTON
Senior Assistant
Attorney General

Office of the Colorado
Attorney General
1300 Broadway
10th Floor
Denver, Colorado 80203
Fred.Yarger@coag.gov
(720) 508-6168

*Counsel for Respondent*
*Colorado Civil Rights Commission*

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

## QUESTION PRESENTED

Colorado's public accommodations law forbids sexual-orientation discrimination by businesses engaged in sales to the public. The question presented is whether that law impermissibly compels speech when it is applied to a commercial bakery that refuses to sell a wedding cake of any kind to any same-sex couple.

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## INTRODUCTION

Public accommodations laws have long operated across the country to "eliminat[e] discrimination and assur[e] citizens equal access to publicly available goods and services." *Roberts v. U.S. Jaycees*, 468 U.S. 609, 624 (1984). Because they "plainly serve[ ] compelling state interests of the highest order," *id.*, these laws have repeatedly survived First Amendment challenge. "Provisions like these are well within the State's usual power to enact when a legislature has reason to believe that a given group is the target of discrimination, and they do not, as a general matter, violate the First or Fourteenth Amendments." *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Bos.*, 515 U.S. 557, 572 (1995); *see also Bd. of Dirs. of Rotary Int'l v. Rotary Club*, 481 U.S. 537, 549 (1987); *Roberts*, 468 U.S. at 626–27; *cf. Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 259–60 (1964).

Colorado's Anti-Discrimination Act, COLO. REV. STAT. § 24-34-301 *et seq*. (the "Act"), has been in effect for more than 100 years. It prohibits businesses that sell goods to the public from discriminating based on race, creed, sex, and other protected characteristics. In 2008, the Act was expanded to prohibit discrimination based on sexual orientation. In this case, the Act was applied to a commercial bakery that refused to sell any wedding cake, of any design, to any same-sex couple. Petitioners challenge that application of the Act as unconstitutional under the First Amendment.

Because the record does not support the claim of compelled speech on which Petitioners' question presented is based, because there is no split in authority among lower courts, and because the decision

below is consistent with this Court's precedents, certiorari should be denied.

## STATEMENT

***Factual background.*** Petitioner Masterpiece Cakeshop, Ltd., is a Colorado limited liability company that sells both pre-made and custom-baked goods to the public, including birthday cakes, cookies, brownies, and wedding cakes. Petitioner Jack Phillips owns and operates the company. Petitioners are willing to serve gay and lesbian customers and will create custom cakes for them for a variety of occasions. But Petitioners have a policy, based on Phillips's religious beliefs, of refusing to sell any wedding cake of any design to a same-sex couple. Pet. App. 53a, 65a.

Respondents Charlie Craig and David Mullins are a Colorado same-sex couple. In 2012, they planned to marry in Massachusetts and have a reception afterward in Colorado.[1] Accompanied by Craig's mother, Craig and Mullins went to Masterpiece to buy a wedding cake for their reception. *Id.* at 5a, 64a.

At the shop, the couple was met by Phillips. When they told Phillips that they were interested in purchasing a wedding cake for their wedding, he replied that it was his standard business practice not to provide cakes for same-sex weddings. He explained that he would sell the couple other baked goods, including "birthday cakes, shower cakes, ... cookies and brownies." But, he said, "I just don't make cakes for same-sex weddings." *Id.* at 4a–5a, 64a–65a.

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[1] At the time, same-sex marriage was legal in Massachusetts but prohibited in Colorado. Pet. App. 5a.

Craig, Mullins, and Craig's mother immediately left. They never discussed details about the cake that Craig and Mullins were seeking, such as the cake's design or whether it would include any special features or messages. *Id.* at 4a, 65a.[2]

***Review by the Civil Rights Division.*** Craig and Mullins each filed a discrimination complaint with the Colorado Civil Rights Division,[3] charging a violation of the public accommodations provisions of the Act. *Id.* at 260a–62a, 269a–71a. Under those provisions, it is a discriminatory practice to deny to anyone "because of disability, race, creed, color, sex, sexual orientation, marital status, national origin, or ancestry ... the full and equal enjoyment of the goods [and] services ... of a place of public accommodation." COLO. REV. STAT. § 24-34-601(2)(a), Pet. App. 93a–94a. A "place of public accommodation" includes any "place of business engaged in any sales to the public." COLO. REV. STAT. § 24-34-601(1), Pet. App. 93a.[4] "Sexual orientation"

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[2] The next day, Craig's mother called Masterpiece to ask Phillips why he had turned them away. Phillips responded that he would not make a wedding cake for a same-sex couple due to his religious beliefs. Again, the two did not discuss any details regarding the cake that Craig and Mullins had hoped to buy. Pet. App. 65a.

[3] The Colorado Civil Rights Division is the agency charged with enforcing Colorado's anti-discrimination laws in the areas of employment, housing, and public accommodations. COLO. REV. STAT. § 24-34-302. The Colorado Civil Rights Commission, Respondent here, is the bipartisan board that conducts hearings of cases investigated and prosecuted by the Division. COLO. REV. STAT. § 24-34-303.

[4] The public accommodations provisions of the Act contain exceptions similar to those found in other state and federal public

means "an individual's orientation toward heterosexuality, homosexuality, bisexuality, or transgender status or another individual's perception thereof." COLO. REV. STAT. § 24-34-301(7), Pet. App. 97a.

The Colorado Civil Rights Division conducted an investigation of Craig's and Mullins's complaints under COLO. REV. STAT. § 24-34-306(2)(a). After completing its investigation, the Division concluded that the claims of unlawful discrimination were supported by probable cause because Craig and Mullins are members of a protected class and had been denied a type of service usually offered by Masterpiece under circumstances that gave rise to an inference of unlawful discrimination. Pet. App. 5a. The Division attempted to resolve the charge through conciliation; when that effort failed, the case was referred to the Colorado Civil Rights Commission.

***Administrative proceedings.*** The Commission issued notices of hearing and formal complaints. The cases were consolidated and assigned to an Administrative Law Judge. The parties agreed to various factual stipulations and filed cross-motions for summary judgment, both asserting that there were no genuine issues of material fact. *See id.* at 64a–65a. Based on the undisputed facts, the judge rejected

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accommodations laws. *See* Pet. App. 42a–43a. For example, those provisions do not apply to churches, synagogues, mosques, or other places used primarily for religious purposes. COLO. REV. STAT. § 24-34-601(1), Pet. App. 93a. Moreover, a place of public accommodation may be restricted to one sex if a patron's sex bears a bona fide relationship to the goods, services, or facilities offered there. COLO. REV. STAT. § 24-34-601(3), Pet. App. 94a–95a.

Petitioners' argument that requiring Phillips to bake a wedding cake for a same-sex couple was tantamount to compelling him to speak. Phillips "categorically refused" to accept the cake order "before there was any discussion about what that cake would look like." *Id.* at 75a. He "was not asked to apply any message or symbol to the cake" that could be reasonably interpreted as endorsing or advocating for same-sex marriage, and, the judge observed, "[f]or all Phillips knew at the time, [Craig and Mullins] might have wanted a nondescript cake that would have been suitable for consumption at any wedding." *Id.*

The judge distinguished hypothetical scenarios involving bakeries that might refuse to serve customers because of the particular design of a requested cake. "In [those] cases, it [would be] the explicit, unmistakable, offensive message" that would allow the baker to refuse the order. *Id.* at 78a. In this case, in contrast, Petitioners refused to bake any cake, without regard to what was written on it or what it might look like. *Id.*

The judge concluded that Petitioners had violated the Act and ordered them to cease and desist discriminating against same-sex couples by refusing to sell them a product that they would sell to heterosexual couples. *Id.* at 87a–88a. The Commission unanimously affirmed the judge's decision. *Id.* at 57a–58a.

***The Colorado Court of Appeals decision.*** Petitioners appealed, and the Colorado Court of Appeals affirmed.

The court unanimously held that Petitioners had refused to serve Craig and Mullins "because of" their sexual orientation and concluded that under Colorado law, Petitioners could not "refuse services to Craig and Mullins that [they] otherwise offer[ ] to the general public." *Id.* at 13a, 19a. In so holding, the court again distinguished circumstances under which other Colorado bakeries have refused to sell cakes to members of the public "because of the offensive nature of the requested message" that was to appear on the cakes. *Id.* at 20a n.8. Facts like those, the court held, are not presented by this case. *Id.*

The court also rejected Petitioners' First Amendment claims, basing its decision largely on Petitioners' refusal to make Craig and Mullins a cake "before any discussion of the cake's design." *Id.* at 28a; *see also id.* at 4a, 35a. The only conduct at issue, the court observed, was Petitioners' "basing [their] decision to serve a potential client, at least in part, on the client's sexual orientation." *Id.* at 29a. Prohibiting that conduct, the court held, did not violate the First Amendment. *Id.* at 29a, 35a–36a, 45a–46a.

The Colorado Supreme Court denied review of the unanimous decision of the court of appeals. *Id.* at 54a–55a.

## REASONS FOR DENYING THE PETITION

This Court should deny the Petition for three reasons.

First, this case is an improper vehicle to address Petitioners' compelled expression claim, which is the basis of the question presented. According to the stipulations and undisputed facts, Petitioners declined to sell Craig and Mullins a wedding cake of any design based solely on the fact that they are a same-sex couple. Had Petitioners refused to serve the couple because they sought a cake with a particular design or which featured a specific message, this case would have presented different legal issues. As postured, however, this case does not raise Petitioners' question.

Second, this case presents no split of authority that requires resolution by this Court. Jurisdictions across the country have consistently agreed with the position taken by the Colorado Court of Appeals—that public accommodations laws may prohibit businesses from refusing to serve same-sex couples. And any conflicts among the cases that Petitioners cite are inapplicable here.

Third, the ruling by the Colorado Court of Appeals adhered to this Court's precedents and does not conflict with this Court's compelled speech and free exercise decisions.

## I. This case is an improper vehicle to address the question presented because the record does not support the compelled expression claim on which the question is based.

The question presented is premised on a factual assertion that is not supported by the record. Petitioners argue that under the decision below, Colorado's public accommodations law "compel[s] Phillips to create expression that violates his sincerely held religious beliefs." Pet. i. More specifically, Petitioners claim that "Colorado requires [Phillips] ... to interview the same-sex couple and develop a custom design celebrating their union," to "research and draft [a] message" he disagrees with, and "to conceive and form an artistic monument to a concept of marriage he finds morally objectionable." *Id.* at 16–17.

None of this is accurate. The parties stipulated that the "conversation between Phillips and [Craig and Mullins] was very brief, with no discussion between the parties about what the cake would look like." Pet. App. 65a; *see also id.* at 287a (statement by Phillips conceding that the "entire interaction lasted no more than 20 seconds"). It is undisputed that Petitioners declined to serve Craig and Mullins without any consideration of whether the cake would be pre-made or custom-made, and regardless of what elements or design the particular cake would include. Petitioners acted not based on the design of the requested cake or the message it might have conveyed, but based on a blanket policy of refusing to sell a wedding cake of any kind to any same-sex couple. *See id.* at 65a (Phillips "informed [Craig and Mullins] that he does not create wedding cakes for same-sex weddings"); *id.* at 75a

(Phillips "categorically refused" to serve Craig and Mullins "before there was any discussion about what th[e] cake would look like").[5]

The Colorado Court of Appeals repeatedly emphasized that the record did not allow it to determine whether the process of making Craig's and Mullins's cake, or the cake itself, would have been "sufficiently expressive" to raise First Amendment concerns. *Id.* at 29a. "[B]ecause Phillips refused to prepare a cake for Craig and Mullins before any discussion of the cake's design," the court held, "the ALJ could not determine whether Craig's and Mullins' desired wedding cake would constitute symbolic speech." *Id.* at 28a. The court recognized that a case with different facts might require a different outcome:

> We recognize that a wedding cake, in some circumstances, may convey a particularized message celebrating same-sex marriage and, in such cases, First Amendment speech protections maybe implicated. However, we need not reach this issue. We note, again, that Phillips denied

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[5] The Petition includes a discussion of the history of cake making, asserting that "wedding cakes are uniquely personal to the newly married couple and require significant collaboration between the couple and the artist to create the perfect design." Pet. 4–5. This discussion is unsupported by record facts, and neither the administrative law judge nor the court of appeals below made any findings regarding those assertions. Instead, as support for its assertions, the Petition cites an instructional guide for cake decorating and an appellate brief that Petitioners filed before the Colorado Civil Rights Commission (which itself relies on the instructional guide). *Id.* (citing *The Essential Guide to Cake Decorating* (2010) and Pet. App. 185a).

> Craig's and Mullins' request without any discussion regarding the wedding cake's design or any possible written inscriptions.

*Id.* at 34a–35a.

Indeed, in cases involving requests to create cakes that feature specific designs or messages that are offensive to the vendor, Colorado law dictates a different result. The Colorado Civil Rights Division has dismissed complaints by a customer who claimed that three bakeries refused to serve him because of his religion when they declined to create specific, custom-designed cakes featuring particular messages. The customer had requested that the bakeries make cakes shaped like an open Bible, inscribed with messages such as "Homosexuality is a detestable sin. Leviticus 18:2" or images such as two groomsmen holding hands before a cross, with a red "X" over them. *Id.* at 20a n.8; *see also id.* at 300a. Each bakery refused to create cakes with those specific designs. *Jack v. Le Bakery Sensual, Inc.*, Charge No. P20140070X, Pet. App. 310a; *Jack v. Azucar Bakery*, Charge No. P20140069X, Pet. App. 301a; *Jack v. Gateaux, Ltd.*, Charge No. P20140071X, Pet. App. 320a. The Division concluded that none of the bakeries had refused service because of the customer's religious beliefs, and they all would have refused to create cakes "for anyone, regardless of creed, where a customer requests derogatory language or imagery." Pet. App. 307a; *see also id.* at 297a–98a, 316a.

Here, had Petitioners been asked to prepare a custom cake featuring a message concerning same-sex marriage, this case would present a different record and raise different issues. Petitioner is correct that,

under Colorado law, "[a]n African-American baker may decline to create a custom cake celebrating the racist ideals of a member of the Aryan Nation" and "a Muslim baker may refuse to create a custom cake denigrating his faith for the Westboro Baptist Church." Pet. 31. And, of course, Phillips himself may not be compelled to create "cakes with offensive written messages" such as "anti-American or anti-family themes, atheism, racism, or indecency." *Id.* at 5. But this is not because of the identity of the customer; it is because of the specific messages and designs that the customer would be requesting. The record here does not raise the compelled speech claim for which Petitioners seek review.

## II. There is no split in authority for this Court to resolve.

The Petition implies that courts across the country are divided in their approach to various legal questions bearing on cases like this one. In fact, the courts are uniform. Petitioners cite not a single case that has exempted a wedding vendor from a public accommodations law due to an objection to same-sex marriage. And while First Amendment cases often present difficult legal questions, the various purported splits in authority that Petitioners do identify are not implicated by this case.

### A. Courts have uniformly upheld the application of public accommodations laws in similar contexts.

In the past three years, a number of courts have applied public accommodations laws to wedding

vendors that have refused to serve same-sex couples. Each court has sided with the decision below.

In *Elane Photography, LLC v. Willock*, 309 P.3d 53 (N.M. 2013), *cert. denied*, 134 S. Ct. 1787 (2014), a wedding photographer refused to provide services for a same-sex couple's wedding. The photographer argued that New Mexico's antidiscrimination law violated her First Amendment speech and free exercise rights. The New Mexico Supreme Court rejected the photographer's challenge, holding that "if [the photographer] offers its services to the public, [it must] provide those same services to clients who are members of a protected class." *Id.* at 68.

In *Washington v. Arlene's Flowers, Inc.*, No. 13-2-00871-5, (Wash. Sup. Ct. Feb. 18, 2015), *hr'g granted*, 2016 Wash. LEXIS 349 (Wash. Mar. 2, 2016), a florist refused to provide flower arrangements for a same-sex couple's wedding. The florist argued that Washington's antidiscrimination law violated her First Amendment speech and religion rights. The court rejected those arguments, explaining that "[t]he existing jurisprudence on this issue ... is soundly against the [florist]." *Id.* slip op. 39–40.

In *Gifford v. McCarthy*, 137 A.D.3d 30 (N.Y. App. Div. 2016), the owners of a wedding venue refused to rent the venue for a same-sex couple's wedding. The venue owners argued that New York's human rights law violated their free speech and free exercise rights. *Id.* at 38–42. The New York appeals court rejected those challenges, concluding that state law "simply requires them to ... offer the same goods and services to same-sex couples that they offer to other couples." *Id.* at 41.

Finally, in *Brush & Nib Studio, LC v. City of Phoenix*, CV 2016-052251 (Sup. Ct. of Ariz., Maricopa Cty., Sept. 16, 2016) (unreported), a stationery vendor sought to refuse to serve same-sex couples. The stationer sued the City of Phoenix, arguing that it should be enjoined from enforcing its antidiscrimination law under the First Amendment. The court rejected this claim, explaining that "the only thing compelled by the ordinance is the sale of goods and services to persons regardless of their sexual orientation. There is nothing about the ordinance that prohibits free speech or compels undesired speech." *Id.* slip op. 9.

Petitioners cite no example of a court that has disagreed with the analysis reflected in these decisions.

### B. Petitioners' asserted inter-jurisdictional conflicts are not implicated by this case.

Unable to identify a split among courts confronting similar factual and legal issues, Petitioners cite cases arising in a wide variety of contexts, claiming that the decision below either creates or exacerbates splits with those cases on three separate legal questions. None of those alleged splits in authority—to the extent they exist at all—are implicated here.

***Zoning cases***. First, Petitioners claim that the decision below conflicts with cases from the Ninth and Eleventh Circuits involving municipal codes that banned tattoo parlors. Pet. 18–22. Those cases—*Buehrle v. City of Key West*, 813 F.3d 973 (11th Cir. 2015) and *Anderson v. City of Hermosa Beach*, 621 F.3d 1051 (9th Cir. 2010)—have no relevance here. Neither case involved a claim of compelled expression,

and neither case involved a public accommodations law. The tattoo parlors in those cases did not seek to avoid serving a subset of customers; they sought instead to avoid government regulation that entirely prohibited them from engaging in expressive conduct. The constitutional doctrine that was central to those cases—the "time, place, manner" doctrine—played no role in the decision below.

Petitioners nonetheless assert that because *Buehrle* and *Anderson* found that tattoos are, as a general matter, a form of protected expression, the ruling below necessarily conflicts with those decisions. Pet. 21. This is incorrect for two reasons.

First, a ruling about the expressive nature of tattoos has limited relevance to a ruling about the claimed medium of expression at issue here. The First Amendment is necessarily fact-specific. *Hurley*, 515 U.S. at 567 ("[T]he reaches of the First Amendment are ultimately defined by the facts it is held to embrace, and we must thus decide for ourselves whether a given course of conduct falls on the near or far side of the line of constitutional protection."). Here, the record does not disclose the features or the messages that might have been part of the particular cake at issue and instead involves a business's categorical policy not to serve a particular product to a particular subset of customers.

Second, the Colorado Court of Appeals recognized that the act of creating a cake could, in certain circumstances, be expressive and could therefore implicate the First Amendment. *See* Pet. App. 34a–35a. Thus, a "municipal ban" on cake shops, *cf. Anderson*, 621 F.3d at 1055, or "an ordinance strictly limiting the number of [cake shops] permitted to operate," *Buehrle*,

813 F.3d at 975, could give rise to a First Amendment claim—just as bans on tattoo parlors can. Here, however, under the particular facts and legal framework of this case, "the compelled conduct [at issue] is the Colorado government's mandate that [Petitioners] comport with [Colorado law] by not basing [the] decision to serve a potential client, at least in part, on the client's sexual orientation." Pet. App. 29a. In applying that mandate to the facts presented here, the court below did not conflict with *Buehrle* or *Anderson*.

***Cases applying the* Spence-Johnson *factors.*** Petitioners next claim that the federal circuits disagree regarding the legal test that determines whether conduct is "expressive" and therefore protected by the First Amendment. Pet. 22–25. Petitioners assert that the circuits have used three separate approaches: some, Petitioners argue, adhere to *Texas v. Johnson*, 491 U.S. 397 (1989) and *Spence v. Washington*, 418 U.S. 405 (1974); some hew to what Petitioners describe as a more lenient test under *Hurley*; and some take what Petitioners call "an intermediate approach." Pet. 23–24. Petitioners do not argue that the Colorado Court of Appeals explicitly chose one of these three approaches but that its analysis "most closely resembles" what Petitioners call the "stringent approach." *Id.* at 24–25.

Whether or not the purported split is real, the decision below does not implicate it. All of the cases that Petitioners cite recognize that, regardless of what legal test is employed, the outcome of a Free Speech claim depends heavily on the facts and the context, and it is the person seeking to avoid the application of state law that bears the burden of proving the

expressiveness of the relevant conduct.[6] Here, the court of appeals applied both the *Spence-Johnson* test and the approach from *Hurley*. Pet. App. 26a, 32a–33a. Rather than attempt to narrow the scope of its analysis to a single formulation of the expressive-conduct test, the court rejected Petitioners' claims under *both* lines of cases. *Id.* And it repeatedly emphasized that the outcome was dictated by the stipulated and undisputed facts, not by reliance on any particular analytical approach: "Phillips refused to prepare a cake for Craig and Mullins before any discussion of the cake's design, [and] the [administrative law judge] could not determine whether Craig's and Mullins' desired wedding cake would constitute symbolic speech subject to First Amendment protection." *Id.* at 28a; *id.* at 32a ("Nothing in the record supports the conclusion that a reasonable observer would interpret Masterpiece's providing a wedding cake for a same-sex couple as an

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[6] *Blau v. Fort Thomas Pub. Sch. Dist.*, 401 F.3d 381, 389–90 (6th Cir. 2005) (examining the record to conclude that the plaintiffs "ha[d] not met their burden of showing that the First Amendment protects" a middle-schooler's desire to "wear clothing that she likes"); *Holloman v. Harland*, 370 F.3d 1252, 1269 (11th Cir. 2004) (holding that "the record amply supports Holloman's contention that the defendants violated his constitutional right to be free from compelled speech"); *Church of the Am. Knights of the KKK v. Kerik*, 356 F.3d 197, 205–07 (2d Cir. 2004) (stating that "[t]he party asserting that its conduct is expressive bears the burden of demonstrating that the First Amendment applies" and carefully examining the evidentiary record to determine whether wearing masks amounted to expressive conduct); *Tenafly Eruv Ass'n v. Borough of Tenafly*, 309 F.3d 144, 161–65 (3d Cir. 2002) (noting the plaintiffs' burden to prove the expressiveness of their conduct and concluding that "the plaintiffs ha[d] not introduced evidence" of expressiveness).

endorsement of same-sex marriage ...."); *see also id.* at 29a–30a.

Even Petitioners concede that the test the court applied below was not dispositive; they assert only that they "would be far more likely to receive free speech protection" under their preferred test. Pet. 25. Given the record, this case does not present the opportunity to resolve the purported conflict that Petitioners identify.

***Cases examining the unequal application of government policy.*** Finally, Petitioners claim that the decision below conflicts with cases from the Third, Sixth, and Tenth Circuits. *Id.* at 30–31. Those cases hold that if a state law or policy contains various exceptions, but refuses to permit an exception for religious exercise, then the law or policy must be reviewed under heightened scrutiny. Again, those cases are inapposite here, and the decision below did not diverge from them.

In Petitioners' view, the Act contains a "myriad of exceptions":

> An African-American baker may decline to create a custom cake celebrating the racist ideals of a member of the Aryan Nation. Likewise, a Muslim baker may refuse to create a custom cake denigrating his faith for the Westboro Baptist Church. Three secular cake artists my reject a Christian's custom cake order because they find his religious message critical of same-sex marriage offensive.

*Id.* at 31–32. These factual scenarios do not describe "exceptions" to Colorado law. They describe how public

accommodations laws work in general. A business may refuse service for a number of reasons, such as the specific design of the product a customer asks the business to create. They may not refuse service based on the identity of the customer.

The cases Petitioners cite, in contrast, *did* involve government policies that denied exceptions to accommodate religion but granted exceptions for other reasons. *Ward v. Polite*, 667 F.3d 727, 735–37 (6th Cir. 2012) (allowing counseling students to decline to engage in various counseling-related services, but not for religious reasons); *Axson-Flynn v. Johnson*, 356 F.3d 1277, 1298–99 (10th Cir. 2004) (excusing a Jewish student from coursework, but not a Mormon student, and applying exceptions to the Mormon student inconsistently); *Fraternal Order of Police Newark Lodge No. 12 v. City of Newark*, 170 F.3d 359, 365 (3d Cir. 1999) (allowing police officers to grow beards for medical but not religious reasons). None of those cases suggests—as Petitioners do—that a public accommodations law forbidding discrimination against same-sex couples must be subject to heightened scrutiny if it allows a "Muslim baker [to] refuse to create a custom cake denigrating his faith." Pet. 31. Petitioners identify no court that has taken that radical position. They thus present no split in authority for this Court to resolve.

## III. The decision below does not conflict with this Court's compelled-speech and free-exercise precedent.

As a final matter, Petitioners claim that the decision below conflicts with this Court's compelled speech and free exercise precedent. Neither assertion is correct.

***Compelled Speech.*** Petitioners assert that the court of appeals rejected their compelled speech claim "based on the feeble justification that Phillips' speech is legally required." Pet. 18. That is not an accurate description of the court of appeals' analysis. The court instead determined that the "compelled conduct" at issue—ceasing to discriminate based on a customer's identity—cannot reasonably be misconstrued as carrying a message about same-sex marriage. Pet. App. 29a–30a. Thus, the court rested its conclusion not only on the fact that nondiscrimination is legally required in Colorado but also on the fact that the mandated conduct, in the context of this case, did not amount to forced expression. *Id.* at 36a ("[W]e conclude that the compelled conduct here is not expressive ...."). Identical reasoning led to a similar conclusion in *Rumsfeld v. Forum for Academic and Institutional Rights*, 547 U.S. 47 (2006). There, the Court held that law schools could be compelled to host military recruiters despite First Amendment objections because "a law school's decision to allow recruiters on campus is not inherently expressive." *Id.* at 64.

Of course, if businesses or individuals are in fact forced to express the messages of the government[7] or a third party,[8] the First Amendment is implicated. But mandating nondiscrimination by a business open to the public "is a far cry from the compelled speech" that violates the Constitution. *Id.* at 62.

This Court's decision in *Hurley* does not suggest otherwise. Contrary to Petitioners' characterization, Pet. 17, it illustrates why the decision below, and its understanding of Colorado law and the First Amendment, is correct. *Hurley* involved a "peculiar" application of a public accommodations law and was decided in the specific "context of an expressive parade." 515 U.S. at 572, 577. The parade's organizers did not exclude any person from marching because of that person's identity; they excluded a particular "contingent" of marchers that wished to engage in an "expressive demonstration of their own." *Id.* at 572–73. Here, consistent with the First Amendment, Colorado law does not prohibit a business from exercising its

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[7] *Agency for Int'l Dev. v. Alliance for Open Soc'y Int'l, Inc.*, 133 S. Ct. 2321 (2013) (prohibiting the government from mandating that aid organizations publish a policy opposing prostitution); *Wooley v. Maynard*, 430 U.S. 705 (1977) (prohibiting a State from requiring citizens to display an ideological motto on their license plates); *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943) (prohibiting a State from punishing students who decline to salute the flag and recite the pledge of allegiance).

[8] *Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n of Cal.*, 475 U.S. 1 (1986) (prohibiting a regulator from requiring a utility company to include a consumer group's message in its mailings); *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241 (1974) (requiring a newspaper to publish a politician's speech).

speech rights: "an Islamic cake artist [may] refus[e] to create a cake denigrating the Quran." Pet. 1. And the conduct that Colorado law prohibits—declining to serve couples because of their sexual orientation—does not raise the First Amendment concerns that motivated *Hurley*. "[S]elling a wedding cake to all customers free of discrimination does not convey a celebratory message ...." Pet. App. 30a. Marching as a "parade unit carrying its own banner," in contrast, does. *Hurley*, 515 U.S. at 572.

***Free exercise***. Petitioners' final argument, Pet. 25–26, is that the court of appeals' decision conflicts with this Court's holding in *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993). That case involved an ordinance whose "object" was "suppression of the central element of the ... worship service" of a disfavored religion. *Id.* at 534. Its reasoning has never been extended to suggest that a generally applicable public accommodations law like Colorado's—which "serves the State's compelling interest in eliminating discrimination," *Bd. of Dirs. of Rotary Int'l*, 481 U.S. at 549—cannot be applied to prevent discrimination against same-sex couples or any other identifiable group of customers.[9] This Court has

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[9] Petitioners quote a statement of one Colorado Civil Rights Commissioner expressing the opinion that religion has been used to justify discrimination. Pet. at 29. This statement, Petitioners claim, reflected hostility to religious belief. Even if that were true, that statement did not reflect the views of the Commission as a whole, nor does it show that the Act, generally or as applied here, singles out religious conduct for unfavorable treatment in contravention of *Lukumi*. No other member of the Commission supported the statement, nor was that statement or any similar sentiment included in the Commission's Order.

"never held that an individual's religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate." *Emp't Div., Dep't of Human Res. of Or. v. Smith*, 494 U.S. 872, 878–79 (1990). In rejecting Petitioners' claims below, the court of appeals did not depart from this Court's free exercise precedent.

## CONCLUSION

The Petition should be denied.

Respectfully submitted,

CYNTHIA H. COFFMAN
Attorney General

GLENN E. ROPER
Deputy Solicitor General

FREDERICK R. YARGER
Solicitor General
*Counsel of Record*

STACY L. WORTHINGTON
Senior Assistant
Attorney General

Office of the Colorado
Attorney General
1300 Broadway
10th Floor
Denver, Colorado 80203
Fred.Yarger@coag.gov
(720) 508-6168

*Counsel for Respondent*
*Colorado Civil Rights Commission*

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